

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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June 1, 2005

Honorable Clifford W. Taylor
Chief Justice, Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Dear Chief Justice Taylor:

Re: Proposed Michigan Rules of Professional Conduct (MRPC)
ADM File No. 2003-62
Proposed MRPC 4.2

I write to recommend that this Court adopt Alternative B for the proposed MRPC 4.2 as the rule in Michigan for governing the standards for attorneys in communicating with parties, including defendants, who are represented by counsel. A clearly stated government-investigations exception to the general rule is essential to enable my office and prosecuting attorneys throughout the State to provide proper legal guidance to police officials involved in criminal investigations.

As the Attorney General, I have the obligation to supervise all of the prosecuting attorneys throughout the State of Michigan regarding their duties in prosecuting crime, see MCL 14.30, and I may, where the situation warrants it, initiate and directly prosecute crime that occurs in any jurisdiction in our State. See *People v Herrick*, 216 Mich App 594, 602 (1996), citing *In re Lewis' Estate*, 287 Mich 179, 183, 184 (1938). See also MCL 14.28. I take these duties very seriously.

Of the two alternatives proposed by the Court, Alternative B is the only exception that clearly enables law enforcement attorneys to continue to provide legal guidance to investigators, consistent with a defendant's constitutional rights, while engaging in appropriate, standard police practices to uncover crime. Alternative A fails to clearly accomplish these objectives.

Alternative B for MRPC 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. *This Rule does not apply to otherwise lawful investigative actions of lawyers employed by the government who are engaged in investigating and/or prosecuting violations of civil or criminal law.* [MRPC 4.2 – Alternative B (emphasis identifies the difference from Alternative A).]

Alternative A for MRPC 4.2 would include in the commentary a lesser exception that allows a government lawyer to direct investigative agents to speak with a represented person as long as the communication occurred before that person was arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding:

Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule. [MRPC 4.2, Alternative A, ¶ 10.]

Under Alternative A, there are two circumstances in which an investigator would have a constitutional right to speak with a defendant represented by counsel, but this version of the rule would arguably prohibit a law enforcement attorney from advising the agent to do so.

First, Alternative A would arguably prohibit a law enforcement attorney, including an attorney in my office, from advising an investigator that the Constitution permits contact with a represented defendant after the defendant has been indicted, *where the defendant initiates the conversation and waives his right to counsel.* See *Michigan v Harvey*, 494 US 344, 352 (1990) ("But nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney"). The police not only have a right to interview a defendant in these circumstances, but I believe the public good requires it. Our ethical rules should not prohibit attorneys from providing sound legal advice to law enforcement officials in carrying out their duties. In fact, the rules should encourage such consultation in order to further insure that a defendant's constitutional rights are respected and that otherwise admissible evidence is not inadvertently excluded. Alternative A fails to recognize that a represented defendant may properly initiate a conversation, waive his right to counsel, and speak with the police about the subject matter of his case.

Second, Alternative A would arguably prohibit a law enforcement attorney, including an attorney in my office, from advising an investigator to speak with a represented defendant *after an arrest on probable cause but before the formal initiation of adversarial proceedings.* See *Michigan v Jackson*, 475 US 625, 630 (1986) ("The arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment"). See also

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Moran v Burbine, 475 US 412, 428-432 (the Sixth Amendment right to counsel does not attach at custodial interrogation before the initiation of adversarial proceedings), citing *Brewer v Williams*, 430 US 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'").

After an arrest, but before a suspect has been formally charged, the police may properly initiate questioning of a suspect consistent with *Miranda* without violating the suspect's constitutional rights even if the suspect had previously retained counsel. Of course, this Court has adopted the rule that where that defendant's attorney contacts the police and wishes to consult with the arrested defendant, the police must inform the defendant of this fact during the interrogation. See *People v Bender*, 452 Mich 594, 615-623 (1996) (Cavanagh, J., lead opinion), 620-623 (Brickley, J., concurring). However, where the police inform the defendant of this fact or where the arrested defendant's attorney did not contact the police asking to consult with the defendant, there is nothing that would constitutionally limit the police from interviewing the defendant. This is appropriate, standard police work. Alternative A fails to recognize that the police may lawfully interview a defendant under *Miranda* before the formal initiation of adversarial proceedings.

Alternative B would clearly establish that there is no conflict for attorneys between good law enforcement practices and fulfilling their ethical obligations under the professional rules. I strongly urge the adoption of Alternative B.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael A. Cox", followed by a stylized flourish or mark.

Michael A. Cox
Attorney General